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No. 07-1223

In The Supreme Court of the United States

EDWARD NATHANIEL BELL,

Petitioner,

v.

LORETTA K. KELLY, WARDEN,
SUSSEX I STATE PRISON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF AMICI CURIAE STATE OF IDAHO AND 30 OTHER STATES IN SUPPORT OF RESPONDENT

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STATEMENT OF AMICI CURIAE INTEREST

States have an interest in maintaining the deferential standards afforded to them under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). As such, the States have a significant interest in how this Court interprets those provisions of the AEDPA, such as 28 U.S.C. § 2254, that entitle the States to that deference. In the context of this case, the States have a particular interest in preserving their ability to conduct summary proceedings of post-conviction claims without forfeiting deferential review by federal courts in federal habeas corpus cases. Idaho, and the 30 other States joining this brief, therefore, urge the Court to reject Bell's and his amici's interpretation of 28 U.S.C. § 2254(d).

SUMMARY OF THE ARGUMENT

The AEDPA, and § 2254(d) in particular, significantly limits the scope of federal habeas corpus review of state court proceedings. The deference to which state court decisions are entitled under AEDPA, and pursuant to general principles of federalism and comity, does not disappear simply because the state court decision was the result of summary proceedings instead of an evidentiary hearing on a post-conviction petitioner's claims. State courts can, and frequently do, adjudicate post-conviction claims on the merits without a hearing, and doing so is

consistent with the application of § 2254(d) and the Constitution.

ARGUMENT

Deference Under AEDPA Is Not Conditioned Upon The Existence Of A State Court Evidentiary Hearing Nor Is Deference Eliminated Whenever A Petitioner Decides To Present Evidence In Federal Court Never Presented To The State Court, Despite The Opportunity To Do So

Section 2254(d) of AEDPA provides that a writ of habeas corpus "*shall not* be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim" resulted in a decision that was either (1) "contrary to, or involved an unreasonable application of, clearly established Federal law," or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." (Emphasis added.) The limitations on habeas relief codified in § 2254(d) and other provisions of AEDPA reflect Congress' desire to advance the principles of comity, finality and federalism. *Williams v. Taylor*, 529 U.S. 420, 436 (2000). Recognizing these principles and the importance of interpreting AEDPA in a manner consistent with "the historic and still vital relation of mutual respect and common purpose existing between States and the federal courts," this Court has "been careful to limit the scope of federal

intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings." *Williams*, 529 U.S. at 436. The States' interest in the integrity of their collateral proceedings necessarily encompasses an interest in their ability to adjudicate post-conviction claims in a summary fashion. That interest and the principles underlying AEDPA are at stake in this case.

Bell and his amici argue that States are not entitled to deference pursuant to § 2254(d) of AEDPA whenever a federal court "properly receives" new evidence that was not presented to, and therefore not considered by, the state court in adjudicating a petitioner's claim. There are two alternative theories upon which Bell and his amici rely: (1) the States are not entitled to deference under § 2254(d) whenever new evidence is presented in federal court because the presentation of additional evidence results in a "new claim" that was never "adjudicated on the merits" in state court (Pet.'s Brief, pp.22-35); and (2) deciding claims in summary proceedings instead of conducting a full evidentiary hearing in state court deprives a petitioner of a "full and fair" opportunity to have his claims "properly" addressed in state court (*see generally* Briefs of Amici Curiae in support of Petitioner). Both of these theories are inconsistent with the plain language and purpose of AEDPA, this Court's interpretation of AEDPA, and well-established principles limiting issuance of the writ.

A. The Presentation Of "New Evidence" In Federal Habeas Proceedings Does Not Deprive The State Of Deference Under § 2254

Federal courts are barred from granting habeas relief unless the petitioner exhausts the remedies available in state court. 28 U.S.C. § 2254(b). The exhaustion requirement "reflects a policy of federal-state comity," *Picard v. Connor*, 404 U.S. 270, 275 (1971), which requires a petitioner to "'fairly presen[t]' federal claims to the state courts in order to give the State the 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (quoting *Picard*, 404 U.S. at 275). "Fair presentation" requires a petitioner to describe both the operative facts and legal theories upon which the federal claim is premised. *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996). "Fair presentation" means more than a "mere similarity of claims" between the issues raised before the State's highest court and those raised in the federal petition. *Duncan*, 513 U.S. at 366.

If, as Bell contends, the presentation of new evidence transforms a claim into a "new" claim that was never adjudicated on the merits in state court, then the exhaustion requirement is not satisfied, and the federal court cannot grant relief. If, however, the presentation of new evidence in federal court is merely offered to buttress the evidence offered in support of a claim already adjudicated on the merits in state court, a petitioner is not entitled to relief absent a showing that the state court's adjudication

violated § 2254(d). *See Holland v. Jackson*, 542 U.S. 649 (2004) (per curiam). This is true regardless of whether the state court conducts an evidentiary hearing because an evidentiary hearing is not necessary to adjudicate a claim on the merits, nor is a hearing warranted when a petitioner fails to offer sufficient evidence in support of his claim that would entitle him to one.

State court proceedings are not a "procedural prelude to lower-federal court review of state supreme-court determinations." *Stewart v. Martinez-Villareal*, 523 U.S. 637, 647 (1998) (SCALIA, J., dissenting.) It is the petitioner's obligation to present all evidence in support of his claim to the state court, whether the State requires him to do so in writing or permits him to do so at an evidentiary hearing. 28 U.S.C. § 2254(d)(2); *Jackson*, 542 U.S. 649. A petitioner cannot fail to do so and then present that evidence for the first time in federal court and avoid application of § 2254(d). *Jackson*, *supra*. "AEDPA does not permit habeas petitioners to engage in [that] sort of sandbagging of state courts." *Miller-El v. Dretke*, 545 U.S. 231 (2005) (THOMAS, J., dissenting).

B. A State Decision Premised On Summary Proceedings Is Entitled To No Less Deference Than One Premised On A Hearing

Like Virginia, it appears virtually every State provides for the summary disposition of post-conviction

claims without a hearing.[1] This does not mean a claim is not "adjudicated on the merits" such that § 2254(d) no longer applies. In some instances, a petitioner may not request a hearing. In other instances, a hearing may be unnecessary because the claim can be resolved on the record before the trial court. It would be absurd to suggest that, in these circumstances, there was no adjudication on the merits simply because there was no state court evidentiary hearing. Indeed, nothing in AEDPA distinguishes between claims

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[1] *See, e.g.,* ALA.R.CRIM.P. 32.7(d); ALASKA R.CRIM.P. 35.1(f); ARK.R.CRIM.P. 37.3; ARIZ.R.CRIM.P. 32.6(c); CAL. PENAL CODE § 1484; COLO.R.CRIM.P. 35(c)(3)(IV); DEL. SUPER.CT.CRIM.R. 61(d) & (h); FLA.R.CRIM.P. 3.850(d); GA.CODE ANN. § 9-14-40, et seq.; HAW.R.P.P. 40(f); IDAHO CODE § 19-4906(b)-(c); ILL. COMP. STAT. 5/122-2.1(a)(2); IND. POST-CONVICTION RULE 1(4)(g); IOWA CODE § 822.6; K.S.A. § 60-1507; KY.R.CRIM.P. 11.42; LA.CODE CRIM.PROC. art. 928-929; ME.R.CRIM.P. 70; MASS.R.CRIM.P. 30(c)(3); MICH.R.CRIM.P. 6.504(B); MINN. STAT. § 590.04; MISS. CODE ANN. § 99-39-11(2); MO.R.CRIM.P. 29.15(h); MONT. CODE ANN. § 46-21-201; NEB. REV. STAT. § 29-3001, *State v. Gray*, 612 N.W.2d 507 (Neb. 2000); NEV. REV. STAT. 34.770; N.J. RULES OF COURT 3:22-9; N.M. R.DIST.CT. R.C.R.P. 5-802E(1); N.Y.CRIM.PRO. LAW § 440.30(d) and (4); N.C. GEN. STAT. §§ 15A-1420(c)(1), (c)(3); N.D. CENT. CODE § 29-32.1-09; OHIO REV. CODE ANN. § 2953.21(5); 22 O.S. § 1089(D)(4), T. 22, Ch. 18, App., Rules 9.7(A)(5), 9.7(E), 3.11(B); OR. REV. STAT. § 138.525; PA.R.CRIM.P. 907(1), 909(B); R.I. GEN. LAWS § 10-9.1-6(b) (1956); *Wood v. State*, 184 S.E.2d 702, 704 (S.C. 1971); TENN. CODE ANN. §§ 40-30-106, 40-30-108; TEX.R.CRIM.P. 11.07; UTAH CODE ANN. § 78B-9-101, et seq., UTAH R.CIV.P. 65C; VT. STAT. ANN. 13, § 7131, et seq., *In re Gould*, 852 A.2d 632 (Vt. 2004), *In re Thompson*, 697 A.2d 1111 (Vt. 1997); WASH. REV. CODE ANN. § 10.73.140; W. VA. CODE ANN. § 53-4A-3(a); WIS. STAT. ANN. § 974.06(3); WYO. STAT. ANN. § 7-14-101, et seq.

resolved on the pleadings, or through summary judgment, and claims disposed of after hearing for purposes of determining whether § 2254(d) applies. Nor is there anything in AEDPA that requires the State to follow a certain procedure in adjudicating the merits of a petitioner's claim. *See Sumner v. Mata*, 449 U.S. 539, 547 (1981) (analyzing the adjudication of a petitioner's claim under § 2254(d) prior to AEDPA and noting the statute did not "specify any procedural requirements that must be satisfied for there to be a 'hearing on the merits of a factual issue,' other than that the habeas applicant and the State or its agents be parties to the state proceeding and that the state-court determination be evidenced by 'a written finding, written opinion, or other reliable and adequate written indicia.'") The only condition to § 2254(d)'s application is adjudication of the claim on the merits.

Contrary to Bell's and his amici's assertions, a state court's ruling in summary proceedings instead of after an evidentiary hearing does not deprive a petitioner of a "full and fair opportunity" to present his evidence, much less require a federal court to ignore § 2254(d) or conduct its own evidentiary hearing.

In Idaho, for example, a post-conviction applicant submits a verified petition alleging facts that would entitle him to relief. Idaho Code §§ 19-4902, 19-4903. The petitioner may attach documents and evidence offered in support of his claim. Id. This procedure affords a petitioner a full and fair opportunity to present the merits of his claim to the state court.

More importantly, though, the adequacy of the state's procedural mechanism for presenting a claim is not part of the § 2254(d) analysis. *See Miller-El v. Cockrell*, 537 U.S. 322, 358-59 (2003) (THOMAS, J., dissenting) (noting that the deference afforded to state court factual determinations pursuant to § 2254(e)(1) cannot be evaded "by attacking the process employed"). A State's post-conviction process simply has no bearing on whether the state court's adjudication was "contrary to, or involved an unreasonable application of, clearly established federal law," § 2254(d)(1), or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," § 2254(d)(2).

This Court's opinion in *Panetti v. Quarterman*, ___ U.S. ___, 127 S.Ct. 2842 (2007), relied upon by Petitioner (Pet.'s Brief, p.56), and the Virginia Association of Criminal Defense Lawyers ("VACDL") (VACDL Brief, p.7), does not compel a contrary conclusion. *Panetti* involved a claim in which the petitioner alleged he was not competent to be executed. 127 S.Ct. 2842. The federal court considering Panetti's habeas petition denied relief, concluding that although the state court proceedings in Panetti's case were inadequate for determining competence under this Court's opinion in *Ford v. Wainwright*, 477 U.S. 399 (1986), Panetti had failed to show he was incompetent.

On certiorari, this Court, addressing Panetti's *Ford* claim, determined it was "unencumbered by the deference AEDPA normally requires." 127 S.Ct. at

2855. This Court reached that conclusion because the state court's "failure to provide the procedures mandated by *Ford* constituted an unreasonable application of clearly established law as determined by this Court," *id.*, *i.e.*, because Panetti satisfied his burden under § 2254(d)(1). This result hardly compels the application urged by VACDL – that a federal court may inquire into the adequacy of a state court's factfinding procedures and ignore the provisions of § 2254(d) if it finds those procedures inadequate. (VACDL Brief, p.7.)

Unlike the situation in *Panetti*, which was based upon "the procedures mandated by *Ford*" for determining competency to be executed, there is no clearly established federal law governing the process by which state courts must evaluate post-conviction claims. As such, a state legislature's specification of and a state court's application of any particular procedure cannot be a violation of § 2254(d).

Apparently recognizing this fact, the National Association of Federal Defenders ("NAFD") and the National Association of Criminal Defense Lawyers ("NACDL") resort to relying on the "history of § 2254" and "the Writ's historical relationship with due process" as providing support for the proposition that a federal court may inquire into the adequacy of the state court process and ignore the requirements of § 2254(d) if it determines the "state court proceedings . . . were procedurally unfair." (NAFD/NACDL Brief, p.10.) Specifically, NAFD and NACDL argue that (although AEDPA eliminated any reference to the

adequacy of the state court's process as a means for avoiding deference otherwise afforded by § 2254), Congress, in enacting AEDPA, simply "t[ook] for granted the procedural foundations of a reliable judgment," and intended to reserve the ability of a federal court to condition its deference on whether it found the state court proceedings "procedurally fair." (NAFD/NACDL Brief, pp.10-20.) This argument is contrary to the plain language of the statute and its purpose.

The interpretation of a statute begins "with the language of the statute." *Williams v. Taylor*, 529 U.S. 420, 431 (2000) (citation omitted). Words in a statute are given "their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import." *Williams*, 529 U.S. at 431 (quotations and citations omitted). "Congress 'says in a statute what it means and means in a statute what it says there.'" *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992)).

Judicial developments relating to federal habeas relief and the legislative development of § 2254(d) upon which NAFD and NACDL rely may have been persuasive had § 2254(d) never contained a reference to the adequacy of the state court process. This, however, is not the case. The "full and fair" state court hearing requirement was expressly provided for prior to AEDPA and was expressly eliminated when AEDPA was enacted. Congress said what it meant

and meant what it said when it passed the current version of § 2254(d) – a federal court may not grant a writ for a claim adjudicated on the merits in state court unless the state court's judgment violates § 2254(d). Nowhere in the statute does Congress condition this deferential requirement on a federal court's evaluation of the state court proceedings.

This plain reading of § 2254(d) is consistent with the purposes of AEDPA in particular and Congress' ability to restrict the issuance of the writ in general. *Rhines v. Weber*, 544 U.S. 269, 274 (2005) ("The enactment of AEDPA in 1996 dramatically altered the landscape for federal habeas corpus petitions."); *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003) ("Statutes such as AEDPA have placed more, rather than fewer, restrictions on the power of federal courts to grant writs of habeas corpus to state prisoners."); *Horn v. Banks*, 536 U.S. 266, 272 (2002) (per curiam) ("[I]t is of course a necessary prerequisite to federal habeas relief that a prisoner satisfy the AEDPA standard of review set forth in 28 U.S.C. § 2254(d)"); *Bell v. Cone*, 535 U.S. 685, 693 (2002) ("The [AEDPA] modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law."). Section 2254 by its plain language requires deference toward the state court regardless of whether the claim was decided in summary proceedings or after an evidentiary hearing.

Further, the absence of a state court evidentiary hearing does not, in and of itself, entitle a petitioner to a federal evidentiary hearing. Rather, § 2254(e)(2) governs evidentiary hearings and "generally prohibits federal habeas courts from granting evidentiary hearings when applicants have failed to develop the factual bases for their claims in state courts" unless the applicant can satisfy the requirements set forth in § 2254(e)(2)(A) *and* (B). *Schriro v. Landrigan*, ___ U.S. ___, 127 S.Ct. 1933, 1939 n.1 (2007). If, however, a petitioner has diligently attempted to develop his claim in state court he will be excused from § 2254(e)(2)'s requirements and the federal court may, in its discretion, conduct an evidentiary hearing. *Williams*, *supra*. While a petitioner's request for a hearing in state court may be relevant to a diligence analysis under § 2254(e)(2), such a request is certainly not conclusive evidence of diligence since it is the petitioner's obligation to allege sufficient facts and evidence that would entitle him to a hearing in the first instance. Similarly, while the failure to hold a hearing in state court may, under some circumstances, have some bearing on assessing a petitioner's diligence and the need for an evidentiary hearing in federal court, the absence of an evidentiary hearing in state court does not, standing alone, require a federal court to conduct an evidentiary hearing.

Even if a federal court decides to conduct a hearing, or expand the record with new evidence, deference under § 2254(d) is not thereby eliminated. The ultimate inquiry, even where new evidence is

presented, remains the same – whether the petitioner can meet the requirements set forth in § 2254(d). As this Court recently explained in *Landrigan*, 127 S.Ct. at 1940, "[b]ecause the deferential standards prescribed by § 2254 control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate." Thus, in deciding whether to conduct an evidentiary hearing, a federal court should first determine whether a petitioner can meet his burden under § 2254(d) because that burden remains even when new evidence is presented. *See id.*, 127 S.Ct. at 1944 ("Even assuming the truth of all the facts Landrigan sought to prove at the evidentiary hearing, he still could not be granted federal habeas relief because the state courts' factual determination that Landrigan would not have allowed counsel to present any mitigating evidence at sentencing is not an unreasonable determination of the facts under § 2254(d)(2) and the mitigating evidence he seeks to introduce would not have changed the result."); *Miller-El v. Dretke*, 545 U.S. 231 (2005) (conducting a § 2254(d) analysis even though evidence was added to the record in federal habeas).

Because of the policy issues implicated in the issue presented in this case, and the merits as set forth above, the undersigned amici respectfully request this Court to hold that deference under § 2254(d) is not predicated on the existence of an evidentiary hearing in state court nor do the States lose deference under § 2254(d) any time a habeas

petitioner decides to present new evidence in federal court or the federal court decides to conduct an evidentiary hearing.

CONCLUSION

The amici respectfully requests this Court affirm the judgment of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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